BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANNA LAURA LERMA Claimant	)	
VS.	)	
NATIONAL BEEF PACKING CO. Respondent	)	Docket No. 1,008,297
AND	)	
LIBERTY MUTUAL INSURANCE CO. **FIDELITY & GUARANTY CO.** Insurance Carrier	)	

ORDER

Respondent and its insurance carrier, Liberty Mutual Insurance Co., request review of the May 11, 2005 Award by Administrative Law Judge Pamela J. Fuller. The date of accident was the sole issue raised on review and determination of that issue resolves which of respondent's insurance carriers is liable for the compensation awarded claimant. Both insurance carriers submitted briefs and the case was placed on the Board's summary docket on August 2, 2005, for decision without oral argument.

APPEARANCES

C. Albert Herdoiza of Kansas City, Kansas, appeared for the claimant. Terry J. Malone of Dodge City, Kansas, appeared for respondent and its insurance carrier, Liberty Mutual Insurance Co. (Liberty). D. Shane Bangerter of Dodge City, Kansas, appeared for respondent and its insurance carrier, Fidelity & Guaranty Co. (Fidelity).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined claimant sustained a 20 percent permanent partial impairment to the right upper extremity as a result of a series of

accidents and injuries that arose out of and in the course of her employment with respondent. The ALJ further determined that June 25, 2002, should be utilized as the date of accident for the series and assessed the award against respondent and Liberty.

Liberty requests review of whether the ALJ erred in determining the claimant's date of accident. Liberty's workers compensation insurance coverage for respondent ended on August 31, 2002, and it argues the claimant's date of accident should be either September 16, 2002, when she was released to return to regular duty or December 4, 2002, when her employment was terminated. Accordingly, Liberty further argues respondent's workers compensation insurance carrier on those dates, Fidelity, should be responsible for the compensation awarded claimant.

Fidelity argues the claimant accepted an accommodated job on June 25, 2002, and did not suffer any additional permanent injury after that date. Fidelity further argues that when claimant was released to her regular job duties she was only able to perform that work for less than a full day and was then returned to accommodated work. Consequently, Fidelity requests the Board to affirm the ALJ's Award.

The sole issue for Board determination is the date of accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

Following creation of the bright line rule in the 1994 *Berry*[1] decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*,[2] which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or micro-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated

[1] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[2] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

position. *Treaster* also focuses upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use or micro-trauma injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[3]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

There appears to be a connecting thread between the decisions beginning with *Berry* that address the date of accident issue in cases involving injuries from repetitive trauma. It is a variation of the last injurious exposure rule previously followed in occupational disease cases. (The similarity between repetitive trauma injuries and occupational diseases was not lost upon the Court in *Berry* when it described one such condition, carpal tunnel syndrome, as "neither fish nor fowl.") A claimant's last injurious exposure to repetitive or cumulative trauma is when he or she leaves work. But when the claimant does not leave work or leaves work for a reason other than the injury, then the last injurious exposure is when the claimant's restrictions are implemented and/or the job changes or job accommodations are made by the employer to prevent further injury.

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[4]

The *Lott-Edwards*[5] decision is also relevant. In *Lott-Edwards*, the Kansas Court of Appeals held the last-day-worked rule is applicable if the work performed in an accommodated position continues to aggravate a repetitive use injury. One of the insurance carriers in that proceeding argued the appropriate date of accident should have

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[3] *Id.* at Syl. ¶ 3.

[4] *Treaster*, Syl. ¶ 4.

[5] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

been in 1994, when the worker left work for carpal tunnel release surgeries, as the employee allegedly returned to work after those surgeries in an accommodated position. The Kansas Court of Appeals disagreed, however, stating the worker had returned to work performing work duties that were substantially similar to those she performed before surgery. The Court explained the worker's injuries were relentless and continuing with no attenuating event, despite the accommodated work. Consequently, the Court reasoned the appropriate date of accident was the worker's last day of working for the employer.

The ALJ noted the evidence in this case established claimant was placed on accommodated work on June 25, 2002, and never suffered additional injuries after that date. The ALJ determined in pertinent part:

> The claimant was initially placed on accommodated work on June 25, 2002. She only made 1 attempt of regular work which lasted less than one day. The claimant also stated that her symptoms are the same as they were when she was initially placed in the accommodated position. A series of accidents were claimed, from the initially traumatic injury date through her last date worked. There is no evidence that the claimant continued to injure herself after she was placed in an accommodated position. Therefore, the claimant met with personal injury by accident arising out of and in the course of her employment on June 25, 2002.[6]

The Board agrees that the evidence establishes that after claimant was placed in an accommodated job on June 25, 2002, she never suffered additional permanent injuries. But considering the *Treaster* decision, the Board concludes the appropriate date of accident for claimant's repetitive trauma accident is the last day that she performed her regular job duties on June 24, 2002, as after that date claimant moved to an accommodated job, which was an attenuating event. Accordingly, the ALJ's Award is modified to reflect the date of accident was June 24, 2002, and affirmed in all other respects.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated May 11, 2005, is modified to reflect a date of accident of June 24, 2002, and affirmed in all other respects.

IT IS SO ORDERED.

[6] ALJ Award (May 11, 2005) at 6-7.

Dated this 31st day of August 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Terry J. Malone, Attorney for Respondent and Liberty Mutual Ins. Co.
D. Shane Bangerter, Attorney for Respondent and Fidelity & Guaranty Co.
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director